IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 771 (826, 827, 828).

UNITED STATES OF AMERICA,
Appellant,

v.

ROCK ROYAL CO-OPERATIVE, INC., *et al.*,
Appellees.

On Appeal from the District Court of the United States for the Northern District of New York.

SUPPLEMENTAL BRIEF

for

ROCK ROYAL CO-OPERATIVE, INC.,
JETTER DAIRY COMPANY, INC.,
and
SCHUYLER JUNCTION, NEW YORK, MILK SHED CO-OPERATIVE, INC.,

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THE REPORTER COMPANY, Inc., Walton, N. Y.
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SUPPLEMENTAL BRIEF FOR ROCK ROYAL CO-OPERATIVE, INC., JETTER DAIRY COMPANY, INC., AND SCHUYLER JUNCTION NEW YORK MILK SHED CO-OPERATIVE, INC.

Points Covered in Brief.

This brief is intended, insofar as the very limited time available will permit, to cover the following:

1. Include Points which were not included in the main brief, in case No. 771, for want of time.

2. Reply to Points raised in the brief of appellant Dairymen's League Co-operative, Inc., in case No. 827.

3. Reply to argument of the Solicitor General in the oral argument before the Court.

SUPPLEMENTAL POINT I.

The discriminations complained of, are prohibited by the Fifth Amendment. Their use in restraint of trade and in the creation of a private monopoly, is illegal, outside of the constitution.

A. A Marketing Order is Exempted From Operation of the Anti-Trust Laws, Only if Issued in Strict Compliance With the Act.

The Act, 8b which provides for marketing agreements, says:

> *"The making of any such agreement shall not be held to be in violation of any of the anti-trust laws of the United States, and any such agreement shall be deemed to be lawful:* Provided, That no such agreement shall remain in force after the termination of this Act."

Section 608c, referring to "orders" *contains no such provision.* Section 608c (8) (9), which provides for issuance or promulgation of Orders, contains no such provision either. *It was probably the intent of Congress to exempt Orders,* as well as agreements from the anti-trust laws, *and the Act may be so construed.*

However, the *exemption* would apply *only* to an *order* or marketing agreement which *complied* with the Act. It would not extend to any *provisions* of an *order* which are *unauthorized.* Of course, if this Court should hold that the Act itself authorized discrimination in favor of co-operatives, and that the terms in the Order which are here complained of, were within the fair intent of Congress and the Act, then the Anti-Trust Laws are, in effect, repealed so far as the Order is concerned.

In either event, it is unnecessary to discuss at length the various exemptions of co-operatives from operation of the Anti-Trust Laws.

Order No. 27 was complementary to and dependent up-

on the issuance of a State Order (Order No. 126) (Art. X of the Order). Thereby, in theory, intrastate milk, as well as interstate milk, would be governed by the Order.

In the case of *Truax v. Corrigan*, 257 U. S. 312, 27 A. L. R. 375, the Court considered due process as applied in the Fourteenth Amendment, to which the complementary Order, Official Order No. 126, is subject. The Court said (27 A. L. R. 382, 383 and 384, 385):

> "Plaintiffs' business is a property right (*Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 465, 65 L. Ed. 349, 356, 16 A. L. R. 196, 41 Sup. Ct. Rep. 172), and free access for employees, owner and customers, to his place of business, is incident to such right. Intentional injury caused to either right or both by a conspiracy is a tort. Concert of action is a conspiracy if its object is unlawful or if the means used are unlawful. *Pettibone v. United States*, 148 U. S. 197, 203, 37 L. Ed. 419, 422, 13 Sup. Ct. Rep. 542."
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> • • • • • •
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> "A law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner of the business and the premises of his property without due process, and cannot be held valid under the 14th Amendment."
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> • • • • • •
>
> "It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the 14th Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power, whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all remedy, is wholly at variance with those principles."
>
> • • • • • •
>
> "'*All men are equal before the law;*' '*This is a government of laws, and not of men;*' '*No man*,

> *is above the law'—are all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute, and apply laws.*" (Emphasis supplied.)

While the Fifth Amendment contains no equal protection clause (*Currin v. Wallace, supra*), the principles involved in the due process clauses of the Fifth and Fourteenth Amendments are practically the same.

The *Truax* case has been followed by this Court in many instances, *Smith v. Cahoon*, 283 U. S. 567; *First Nat'l Bank v. Maine*, 284 U. S. 332; *Seaboard Airline Railway v. Watson*, 287 U. S. 90; *Consolidated Textile Co. v. Gregory*, 289 U. S. 86; *Adam v. Saenger*, 303 U. S. 64. If the doctrine there expounded has been overruled, we have been unable to find any such decision.

B. The Provisions of the Capper-Volstead Act Do Not Permit the Discrimination in Favor of Co-operatives Provided for in the Order. Nor Do the Provisions of Section 608c (5) (F) Authorize the Discriminations Present in the Order.

The Capper-Volstead Act authorizes the creation of co-operative associations and marketing of farm products (U. S. C. A. Title 7, Section 291). This statute provides:

> "Persons engaged in the production of agricultural products as farmers * * * dairymen * * * may act together in associations, corporate or otherwise * * * in collectively * * * preparing for market, handling and marketing in interstate and foreign commerce"; such authority being conditioned upon the co-operative organizations meeting specified requirements.

> Sec. 292 (U. S. C. A.) provides that: "if the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve notice on such association a complaint

> * * * requiring the association to show cause why an order should not be directed to cease and desist."

Section 292 specifically disapproves use of the Act in unlawful monopoly or restraint of trade. While the section permits only the Secretary to take affirmative action by issuing an order to "cease and desist from monopolization or restraint of trade;" any reasonable interpretation of the (Capper-Volstead) Act does not give co-operative associations any right to engage in monopolistic acts or restraint of trade in the absence of an Order of the Secretary to the contrary.

The basis of the League's present claim of exemption, is contained in Paragraph 8c (5) (F) of the Act, which is as follows:

> "*Nothing* contained in this subsection (5) is intended or *shall be construed to prevent a co-operative* marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended (Code, Title 7, Secs. 291, 292), known as the 'Capper-Volstead Act,' engaged in making collective sales or marketing of milk or its products for the producers thereof, *from blending the net proceeds of all* of its *sales in all markets in all use classifications,* and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.*" (Emphasis supplied.)

This section merely permits the blending of receipts for milk. It does *not* exempt co-operatives from the provisions of Section 608c (5) (C), which require that

> "the total sums paid by *each handler* (including *producers,* who are *also handlers*) shall equal *the value of the milk purchased by him at the prices fixed in accordance with Paragraph A hereof.*" (Emphasis supplied.)

The subsection (F), far from authorizing underpayment for milk received, and sold in the area, specifically provides that a co-operative "shall *not sell* milk * * * *in any market* at prices *less* than the prices fixed pursuant to Paragraph A of this subsection (5) for such milk."

The Secretary has no authority to allow the League to blend proceeds of milk sold in other markets "*at any price he* (it) *sees fit*" for the actual purpose of *evading* provisions of *8c (5) (A), which requires* that *prices* to be paid for milk "*shall be uniform as to all handlers,*" which provision is repeated in Section 8c (5) (C), above quoted. His only authority is the Act.

Section 8c (13) (B) provides:

> "No Order issued under this Title shall be applicable to any producer *in his capacity as a producer.*"

This does not exempt *a producer, who is also a handler,* from paying the same total price as any other handler. The Court *will not read into the Act,* an *exemption* of *co-operative* associations, *which has not been placed in the Act by Congress.* We find no such exemption. Judge Cooper found none. The appellant, Dairymen's League, points out none. It bases its argument, pages 57 to 69, inclusive (Brief in Case No. 827), on the following claims:

1. On pages 57-58, it is claimed Section 608c (5) (F) which we have just discussed "treats co-operative marketing associations in a different manner." It does not point out *in what manner* it claims *this Section exempts it* from the requirements of Section 608c (5) (A) (C) requiring *all handlers* to pay the same *uniform* or *equal* price.

2. On page 58, it asserts that Congress and the Legislatures have for many years, followed a policy of exempting co-operatives "from many provisions of the law applicable to ordinary business corporations." *In the absence of any such provision in the Act,* this argument is pointless.

3. On pages 59-65, inclusive, the argument is advanced that exemption from Federal and State Anti-Trust Laws authorize the exemption found in the Order. We can only repeat that *authority* for the exemption *must be found in the Act itself.* There being none, *exemption* of co-operatives from payment of taxes, from compliance with sanitary laws, health laws, anti-trust statutes, or any other statute, *will not extend to the act in which no such exemption is granted.*

4. Pages 65-69, inclusive, consist principally of quotations from a bulletin issued by the U. S. Department of Agriculture, and which contains general statements concerning co-operatives. This statement by the Department in 1929, will not add to or detract from the language of the Act.

We have already pointed out the evidence, conclusive the League, that the *absolute minimum* cost of a bot- of milk delivered in New York City in the whole- le trade, is 9 3/4¢. In the Dairymen's League state- ent on this subject, printed in the Dairymen's League ews, November 15, 1938 (Exhibit 24-H to the Stipula- n, printed R. 594), we find the following statement, eviously printed page 58, appellees' brief.[1]

"To meet prices established under the federal-state milk marketing order milk should sell to stores at 9 3/4¢ per quart. *A good many dealers are selling at 9¢ and soliciting new business.* * * * To pay established prices, pay for full butter fat content and all other charges, 9 3/4¢ is figured as the *absolute minimum* at which *handlers* can sell milk to stores *and make full payment to producers.*" (Emphasis supplied.)

This "absolute minimum" cost *is assumed to be the ne for all handlers.*

At least no different costs are pointed out.

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1 The quotation contained on page 58, inadvertently makes it ap- that the same was contained in the League News for May 17th. statement quoted from that issue, Exhibit 24 to the stipulation, rred only to the fact that half of all milk sold in New York City, andled through stores, as wholesale milk.

Sales by the League at less than 9 3/4¢ per quart, implies payment of *less* than the *uniform* price *for milk at its source,* since transportation, labor, fuel and things of that character are fixed by tariffs, market conditions, etc. (discussed hereafter). *Absolute minimum implies efficiency* and *economical operation.*

When the League on November 15th said that many dealers were "selling at 9¢ and soliciting new business," its officials must have had their tongues in their cheeks. *It was the League which led the raid on Jetter's business on September 4th, four days after the Order became effective* (Finding No. 62, R. 145).

Sheffield's also captured Jetter's business.[2] League officials knew that the resale price of all milk sold by dealers, such as Jetter (who paid top prices), was below their cost. It had very early engaged in this unfair price cutting and again, it used this situation, created by itself and others with competitive advantages under the Order, to injure Jetter and others in its position, in their business. The League News, of November 15th, also says (R. 594):

> "There is apprehension in some quarters as to what this situation may lead to in the future. If history repeats itself, and it usually does, further price cutting may be expected. Some day some dealer who loses business to one of the price cutters will lower his selling price below the quotation of his rival. It takes only a few such instances to launch a wave of price cutting and soon the foundation has been knocked from under the price structure.
>
> "Remedy for the present condition is in the hands of the producers supplying handlers who are trying to wreck the market. By insisting that they receive full payment for all of their milk in accord with all of the regulations of the federal-state program, they can make it practically impossible for dealers to destroy their market."

2 Details, pages 59-61 inclusive of appellees' original brief.

Dealers with competitive advantages were destroying the less fortunate, and the League News was slyly mocking them.

This was followed out in the visits made to Jetter's patrons by League representatives, who intimated that the Jetter producers might not be paid (R. 284, 287, 288); that they should quit Jetter and go to League, where they were sure to get their money.

In the stipulation of agreed facts in evidence, Paragraphs 78, 79 and 80 (R. 268), it is *stipulated* that the statement contained in the Dairymen's League News of November 15, 1938, to the effect that 9 3/4¢ is the absolute minimum at which milk could be sold to stores, is the "opinion of a substantial number of other and competing milk dealers distributing milk to the wholesale trade in the Metropolitan area to the minimum delivered wholesale cost of milk bottled in glass per quart."

It also stipulated "that the affidavit of Paul Grossman, verified November 25th (Exhibit 43 to the stipulation) may be considered as the evidence of said Paul Grossman with the same force and effect as if said Grossman had testified to the matters therein stated (R. 268).

Grossman's affidavit is printed (R. 645, 646). He reviews the costs which enter into the delivered cost of milk, and finally states his opinion as an accountant of many years' experience in the milk business, that "deponent believes it to be *utterly impossible for any dealer, by any means of saving, to deliver such milk for less than 9½¢*, and the cost to *many dealers is more than 9¾¢ per quart* * * * in glass bottles."

These things were *stipulated in advance of the trial. No evidence to the contrary was offered. Argument now to the effect that the delivered cost of milk was less than 9¾¢, is unworthy of consideration.*

C. As Yet, the Taking of Private Property for an Alleged Public Purpose, Without Due Process, Contrary to the Fifth Amendment, Has Not Been Authorized in Favor of Co-operatives, or Otherwise.

There is no exemption from the Fifth Amendment in the Constitution, which permits the taking of property from one citizen, to be given to co-operatives under the guise of an alleged public purpose.

Even if the language of the Act exempted co-operatives from compliance with its provisions, and thereby took the property of appellees for an alleged public purpose, it would be violative of the Fifth Amendment. As yet, the Fifth Amendment remains unchanged in that respect. Argument or citation of authority should be unnecessary in this regard.

D. Payment to Co-operatives Under Article VII, Section 5 and to Co-operatives and Proprietary Handlers Under Article VII, Section 6, Are Not Authorized by the Statute. Those to Co-operatives Under Section 5 Are Arbitrary and Bear No True Relation to Actual Costs. If They Are Payable to Co-operatives, They Should Equally be Payable to Proprietary Handlers, and in Any Event, Would Constitute a Subsidy.

This proposition has already been referred to by appellees' brief, pages 25 to 31, inclusive. The League brief, pages 69 to 70, inclusive, argues that these payments were contemplated by the statute and that appellees have no standing to question them. We will take these propositions up separately:

1. On pages 69 and 70, the League argues that these payments come from the Producer Settlement Fund and "therefore come out of producers." We have already pointed out, pages 31, 32, 75, and elsewhere, that the price paid by Jetter was made up of two items; one payment was made to the administrator, and the other payment to producers. The total price which Jetter

paid, was higher than that of its competitors. A part of its excess price was distributed to these same competitors and constituted a taking of its money by exaction of a discriminatory and excessive price.

2. On pages 70 to 76, inclusive, the League reviews various reports and general statements to the effect that surplus milk presents a serious problem. On page 74, it is argued that a co-operative which has no manufacturing facilities, should get the 5¢ payment for bargaining for its members. On page 75, it argues that co-operatives with manufacturing plants, should receive the subsidy. No facts or figures are given, nor is any reason shown why a proprietary handler with manufacturing facilities should not receive the same payment as a co-operative handler. No facts or figures appear to have been presented to the Secretary, showing any actual extra expense by a co-operative either with or without manufacturing facilities.[2]

3. On pages 76 and 77 of its brief, the League points to Section 608c (5) (B) (ii) which refers to an adjustment "which equitably apportions the total value of the milk among producers and co-operatives." This section provides:

"(ii) *For the payment to all producers* and associations *of producers delivering milk to all handlers of uniform prices for all milk so delivered,* irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for * * * (d) *a further adjustment,* equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, *on the basis of their production of milk during a representative period of time.*"

This subsection makes no provision for "service" payments or special payments to co-operatives. Obviously, it refers to the quota plan in effect in the Boston market, the Pittsburgh market and elsewhere, and refers to the ratio which the quan-

2 See Supp. Point II—B.

tities of fluid milk produced during the short season, bears to that produced in the surplus period.

4. Again on page 77, the League seeks to justify the payments under Section 10 (b), which provides:

"The Secretary in the administration of this chapter shall accord such recognition and encouragement to producer-controlled co-operative associations as will be in harmony with the policy towards co-operative associations set forth in existing acts of Congress and as will tend to promote efficient methods of marketing and distribution."

Surely this section does not authorize taking of moneys either from producers or handlers to be given to co-operatives. It does not extend to taking money from Jetter by way of extracting a higher price from it or from the producers delivering to appellees, Rock Royal and Schuyler Junction, in order to pay the League 5¢ per cwt. on its milk and all milk purchased by the Borden Company in its own plants. So far as appears in the record, the League never receives or comes in contact with that milk.

5. On page 78, the argument is made that these payments to certain co-operatives from the funds of appellees, does not deprive them of their property without due process of law. The argument defeats itself.

The same argument applies to preferential payments to Sheffields and other large handlers of 23¢ per cwt. on milk manipulated in their own plants, as well as to trucking charges, which we have already pointed out, run into large sums of money.

E. The Discriminatory Terms of the Order, Are Contrary to the Representations Made by the Dairy Section, U. S. Department of Agriculture, at the Opening of Hearings on Order #27.

The original stenographic transcript of the hearings on the Order, pages 31 to 33, contain the testimony of Paul L. Miller, principal Agricultural Economist, Dairy Section of the Agricultural Adjustment Administration at

rst hearing at Albany, N. Y., May 16th, 1938. Mr. r produced what is known as the "Economic State-" of the Government. Actually, it is entitled:

"STATEMENT CONCERNING THE
NEW YORK METROPOLITAN MILK MARKET
AND THE
PROPOSED MARKETING AGREEMENT
AND PROPOSED ORDER

Prepared by the Dairy Section, Division of Marketing and Marketing Agreements, Agricultural Adjustment Administration."

s statement was received in evidence, page 34 of anscript (hearings on the Order), as Exhibit No, 9. at time, Mr. E. O. Mather, principal attorney for epartment of Agriculture, said (pp. 33, 34, original ript of hearings):

"I might say that a limited number of the copies of this statement are available for those persons who are actively interested in either proposing or opposing the marketing agreement."

document, which is part of Exhibit 3 to the stipula-on pages 110 and 111 contains the following state-

"*One of the major objectives of this proposed marketing agreement and proposed order is to place all handlers on a comparable basis with respect to the price they are required to pay producers for milk sold in the several use classes.* In order to do this all *competitors* in the market *must be regulated to the same degree* so that the market operates efficiently *and losses engendered by unrestrained, unfair competition are eliminated.* In order that this major purpose may be accomplished *all persons* involved in the handling of milk and its products must be subject to the proposed marketing agreement and proposed order. *All*

> *types of business organizations are* found in the market, making it necessary that the definition of a 'handler' be broad enough to include all of them *so that no provision of the proposed marketing agreement and proposed order will be discriminatory with respect to different firms or persons.*" (Emphasis supplied.)

That statement is contrary to the provisions of the Order as adopted.

SUPPLEMENTAL POINT II.

The Order regulates only part of the marketing area, and thereby makes possible, the tremendous competitive advantages to the largest handlers through the medium of "unpriced" milk.[3]

The Federal Trade Commission Report, House Document No. 95, 75th Congress, First Session, which is a part of Exhibit 3 to the stipulation, *describes* both the *Production area* of the *New York milk shed*, and the *New York Metropolitan market*. It lists the markets outside of the Metropolitan Area, and then describes the Metropolitan market, *as including New Jersey*. It also describes the population of the area, showing that about 22% reside in New Jersey. We quote the report, pages 6 and 7, which states:

> "The New York milk shed includes New York metropolitan area and not less than 10 other relatively large cities, of which Buffalo, Rochester, Syracuse, Utica, Albany, and Binghamton, N. Y., and Scranton and Wilkes-Barre, Pa., represent markets of considerable magnitude. In addition to these there are more than 30 municipalities having populations in excess of 10,000 persons. The production area of these secondary markets necessarily overlap the area shipping milk to the metropolitan market.

3 Details discussed Point I—A-B-C—pp. 10-23 original brief.

"New York metropolitan market.—*The New York metropolitan area lies in two States, New York* and *New Jersey,* and as sometimes defined includes a small part of Connecticut. The report of the joint legislative committee to investigate the milk industry in New York described the New York metropolitan area as including New York City and the Counties of Nassau, Suffolk, Rockland, and a part of Westchester County in New York, and Hudson County and a part of Bergen, Essex, Middlesex, Monmouth, Passaic, Somerset, and Union Counties, N. J. The *total population* (1930) of the area was estimated at about *10,093,000,* of which *New York City* represented about *6,930,000, other municipalities* in the New York area *901,000,* and *New Jersey* about *2,262,000* persons. It was stated in the report referred to above that it required nearly *'100,000 forty-quart cans* of whole milk *daily,* plus *half again as much* milk *'in the form of cream'* to supply the New York metropolitan area.

"During January, 1936, officials of the Department of Health for New York City estimated that it would require approximately 10,000,000 quarts of milk a day to supply New York City alone with milk for all purposes, including fluid milk, sweet cream, sour cream, buttermilk, and for manufacturing. These officials also estimate that about 2,900,000 quarts of fluid milk were consumed in New York City daily. *There were approximately 350 licensed dealers operating* in the city about *9,000 milk-wagon routes.* Of this number, it is estimated that the *Bordon Farm Products Co., Inc.,* operated *2,900 routes* and the *Sheffield Farms Co., Inc., 3,000 routes.*" (Emphasis supplied.)

t will be seen that the New Jersey milk, which the der permits to be blended at any price a dealer "sees " is just as much a part of the Metropolitan milk rket as any other milk. It would be just as fair and t as feasible to say that dealers selling in both Man- tan and the Bronx, could blend their sales in either mmunity, at any price which they "see fit." Large mpanies such as Bordens and Sheffields, which, operate both Manhattan and the Bronx, would have a com-

petitive advantage over the dealer whose business was confined to just one of the Boroughs. Or, Brooklyn and Long Island could be excluded. Such exclusions would be just as justifiable (and just as unfair) as the exemption of the New Jersey portion of the Metropolitan Area.

The *Order* was manifestly *designed to fit the markets supplied by the League, Bordens* and *Sheffields*, as well as *to fit* the *manner of their operations.* The *regulation* of *all* business of small handlers *dealing only* in the part of the Metropolitan Area to the *north of the Hudson River,* while *regulating* only *part* of the *enormous businesses* of the *League, Bordens* and *Sheffields* in the same marketing area, constitutes an arbitrary and discriminatory regulation, as applied to the small handlers.

A. The Exemption of the New Jersey Part of the Metropolitan Market From the Order Was More Unfair, Since Resale Prices Were Fixed and Maintained in New Jersey, While They Were Not Fixed in New York.

We have already pointed out that New Jersey statutes fixed the resale price of milk (wholesale) at 11¢ per quart in rural districts of New Jersey and 12¢ per quart in the more populous districts (p. 15 original brief).

Had there been a resale price fixed, either by statute or by a fair trade practice clause under Section 608c (7) (A), of *even 10¢* per quart *in the New York market,* Jetter could have complied with the Order and continued to stay in business. He could have operated at a possible profit of ½¢ per quart. His more fortunate large competitors, *League, Bordens,* and *Sheffields,* were *protected in the New Jersey market. They would have made substantial profits even if they had accounted to the producers settlement fund for their New Jersey milk at $2.76 per cwt. instead of at less than $1.60 per cwt.*

However, there was no such regulation in the New York market. On the contrary, the *resale prices* of milk *were reduced* far below Jetter's cost *by* the *handlers who were given large competitive advantages under the Order.*

And this was *rendered possible by the Order* which had the force and effect of a statute. Judge Cooper pointed out at (R. 769), that this was a case of "statutory *disarming of one set of competitors and sending (them) into competitive battle with another set to whom the same statute supplies arms.*"

He discussed the application in the case of *Hegeman Farms v. Baldwin*, 293 U. S. 163, which is substantially relied upon by the appellant, in his opinion, at (R. 769), saying:

> "*Hegeman Farms Corporation v. Baldwin*, 293 U. S. 163, upon which some of the plaintiffs rely, has little application here.
>
> "There was *no* producers' *settlement fund* nor *other pooling arrangement for payments by one of the beneficiaries to another. The decision* was influenced there by the *failure of any showing* by the plaintiff that his *handicap in competition* was *not* due to his *own inefficiency.*
>
> "There is no question of inefficiency, as has been shown.
>
> "It is said that the losses suffered by Jetter Dairy Company and others are caused by the competitive conditions in the marketing area and not by reason of the statute and order. *It is the order* under the statute *which compels the proprietary handlers to make fixed payments to producers and other payments into the milk producers' settlement fund* and *causes these large losses,* while permitting co-operatives to pay what they please to producers and giving such co-operatives, especially large ones, other discriminatory preferences, both as to the amount paid into and withdrawn from the producers' settlement fund. *These grossly discriminatory provisions permit in such a competitive market, by means of the settlement, the taking of the property of some and transferring to others without compensation and thereby eliminating them entirely from the competitive field.*
>
> "This *competitive condition was known* when the statute was enacted and the order was issued, for *it had long existed* and could not be cured by any and all the previous attempts at remedy.

These *defendants have no* power or *control* over *these competitive conditions. Efficiency is not a factor.*

"This is not a case of 'protecting a business against the hazards of competition' as plaintiff's counsel assert, citing *Hegeman Farms Corp. v. Baldwin,* 293 U. S. *supra.*

"This is more like a case of statutory disarming of one set of competitors and sending into competitive battle with another set to whom the same statute supplies arms.

"*Neither the order nor the statute made any attempt to remedy the competitive conditions and the operation of the order must have been foreseen. In any event the statute as applied* in the order *brings the arbitrary discrimination and disaster hereinbefore shown.*" (Emphasis supplied.)

B. The League, Bordens and Sheffields Were Entitled to No Subsidy by Way of Market Service Payments Because of Their Manufacturing Operations.

The appellees, in their answers (Jetter R. 95), alleged that *the Order,* by *preferential low prices* charged *for milk* in *the lower brackets, gave a competitive advantage to the three large handlers,* which advantage, applied to reducing the price of fluid milk, would enable large handlers to destroy the smaller handlers.

Proof to this effect was introduced by witness Mills, as applied to cheese (R. 301-305); witness Barber testified (R. 295-299) that the actual market price for cream to be used in butter, was approximately equal to the price of the whole milk equivalent. In other words, the price fixed under the Order for whole milk, ultimately used in butter, was only equal to the value of the cream, leaving the skim milk unpaid for. The value of the skim milk was proven by witness Bullock (R. 363-364), and its value when manufactured into milk powder and other products, was testified to by witness Miller (R. 312-).

We have already pointed out that this proof was not completed for lack of time, because of the filibustering

tactics of the intervening plaintiff Dairymen's League, and the closing of appellees' case at the insistent request of the Government.

However, the report of Hon. John J. Bennett, on the milk industry of the State of New York, dated March 8th, 1938, referred to on page 73 of the League brief, as being a part of Exhibit A-3 (to the stipulation), reviews the actual facts with reference to surplus milk.

His report completely explodes the entire argument of appellant's to the effect that handling of surplus milk warrants the payment of subsidies both to co-operative and proprietary handlers. The report states on pages 114-115:

> "In connection with the manufacture of these surplus products it is important to realize that the milk purchased for use by these various companies was purchased at a price far below the fluid milk prices.
>
> "Table 6, in an earlier part of this report, shows the different types of surplus use and Table 10 shows the declining rate of return to the producers for the milk used in these surplus brackets.
>
> "As will be seen later in this portion of the report, profits on the sale of ice cream, condensed milk and other by-products of milk are large.
>
> *"The result of the low prices paid for surplus milk is that milk sold in the lowest price classification results in the greatest return to the distributor."*
>
> . . . . . .
>
> "Naturally, the *milk purchased for use in surplus manufacture operations is acquired mainly in the surplus months of spring and early summer."* (Emphasis supplied.)

And at page 116 it is stated:

> "Profits of Companies Engage in the Manufacture of Products from Surplus Milk.
>
> "Ten typical companies in this business were analyzed.

"One company in the business of manufacturing milk into dry milk powder, casein, milk sugar and similar products made a net profit of $349,500 on sales of $1,246,000 for the year 1936. Profits amounted to 32.9% on sales before taxes and 28% on sales after taxes.

"*Based on return of net tangible assets this company made 108.66% profit on net tangible assets.* For the first six months of 1937, the return of this company was 22% on sales and 57% on net tangible assets. As the 57% just mentioned was only for six months there can be no question that its 1936 return will be duplicated in 1937.

"*Another company doing business in condensed milk alone* made a profit in *1936 of 69%* on net tangible assets after deducting Federal taxes. This same company made a profit of 10% on sales after the deduction of taxes. The profit amounted to $829,500 on total sales of $8,071,000.

"The consolidation of three ice cream companies affiliated through a common holding company showed that on net sales of $4,650,000, the profit made was $931,000, or approximately 20% on sales before taxes for the year ended December 31st, 1936." (Emphasis supplied.)

On pages 99 and 100 of the report, we find a frank discussion showing manipulation of milk back and forth between Bordens and National Dairy, and their subsidiaries, prior to the promulgation of the Order. We print these extracts for the reason that they shed light on the practices of these two large companies in this repect and also in issuing misleading statements concerning their operations. The report states on pages 99 and 100:

"In *December of 1937* the *Borden Farm Products Division of the Borden Company* issued a *statement* to its customers and *to the press* which indicated that *for the six months ending September 30th, 1937, 'for every dollar you spent* for Borden's milk' *they lost 1.02 cents. Sheffield Farms Co., Inc.,* a subsidiary of National Dairy, also issued a *statement* in the Spring of 1937 entitled 'Where the Milk Dollar goes,' which showed that *for the*

year 1936 its profit averaged less than 1/8 of 1 cent per quart 'on all milk handled.' Those statements and the conclusions of this investigation appear to be inconsistent. Actually they are not comparable. An analysis of those statements reveals the following facts:

"In the first place, *neither statement is representative of profit or loss on the sales of fluid milk at retail and to stores.* The Sheffield statement specifically says that it is on the basis of 'all milk handled.' In the first place, Sheffield Farms does not sell all of the milk it handles to the public. In 1936 the Sheffield Farms Company sold in excess of 111,000,000 quarts of milk to affiliated companies. While this 111,000,000 quarts of milk may properly be included in a statement of the amount of milk handled, it is by no means a statement of the amount of milk sold to the public. For the first nine months of 1937 the volume of milk sold to affiliated companies was nearly 63,000,000 quarts. This amount of 174,000,000 quarts was 'handled,' but sold to its affiliates at an average price of 3.5 cents per quart. If, for example, Sheffield Farms sold this milk to its subsidiary or affiliate at a price below cost, the affiliate would make a larger profit because it bought its raw product at a low price, but the Sheffield Farms Company would lose money on that 174,000,000 quarts. *This supposition is not fanciful. Investigation into the affairs of the Sheffield Condensed Milk Company, an affiliate of the Sheffield Farm Products Company,* showed that in the first nine months of 1937 it purchased 61,126,612 quarts of milk equivalent, in the form of milk and cream, from Sheffield Farms Company at the rate of 3.225 cents per quart. The total purchases of the Condensed Milk Company from all sources amounted to 85,688,798 quarts. The total price paid for the 85,000,000 quarts was 3.41 cents per quart. It is apparent, then, that the price to the Sheffield Condensed Milk Company, as charged by the Sheffield Farms Company, was approximately 8/10 of a cent per quart below the price paid by the Condensed Milk Company on the open market. Without a complete audit of the subsidiary companies and investigation into

other factors, there is no way of determining whether or not this sale was below cost. However, it is interesting to note that the Sheffield Condensed Milk Company made a profit of 68% on its net tangible assets after payment of taxes in 1936, and an estimated profit of 28% on net tangible assets after payment of taxes for the year 1937. It is also to be noted that in August, 1937 Sheffield Condensed Milk Company stopped its practice of buying the major portion of its supply of milk from its affiliated company, Sheffield Farms, Inc." (Emphasis supplied.)

There are many interesting facts contained in the Attorney-General's Report. For instance, he points out that all handlers are subject to the same basic costs. He discusses freight differentials intended to make the delivered cost of milk in New York City the same to all distributors.[4]

The Report says pages 70 and 71:

"The distributor pays substantially the same for the milk, regardless of location, for, if the distance is less than 200 miles—he pays more to the producer—but his freight rate is lower. And conversely if the distance is greater he pays less to the producer—but spends more for freight. In addition to the differentials just mentioned there are numerous other differentials such as location differentials, volume differentials and the like.

"The operations involved in the handling and distribution of milk after it leaves the farm have been grouped in all financial reports and statements submitted by distributors and their accountants in the course of this investigation, into the following major items:

"1. Country plant operations.

"2. Freight and hauling from the country to the city plant or to the pasteurizing plant.

"3. Pasteurizing, bottling and city plant costs.

4 The findings show that freight differentials under the Order, are discriminatory (see Finding No. 49, R. 141).

"4. Selling and delivery.

"(a) wholesale, *i. e.,* to stores, restaurants, hotels, institutions and to other dealers.

"(b) retail, *i. e.,* delivery to the door of the consumer.

"5. Administration, general and overhead expenses.

"6. Container costs.

"In our analysis, we have followed standard practice and used the elements generally used in such studies. In the tables that follow, code letters are used to indicate different distributors. This is done to avoid unfairly disclosing confidential business information to competitors.

1. Country plant operations.

"As has been indicated earlier in this report when milk leaves the farm *it may either go to the country plant of the co-operative* which acts as agent for the producer *or it may go to the country plant owned or operated by the distributor.*

"The country handling costs found by this investigation consisted of the following items:

"Labor
"Repairs to buildings
"Repairs to machinery
"Coal
"Light & Power
"Supplies
"Ice
"Automobile repairs and expenses
"Automobile gasoline and oil.
"Insurance
"Depreciation
"Taxes
"Telephone
"Miscellaneous expenses."

The Attorney-General found no difference between country plant costs in either "the *country plant* of the *co-operative*" or the "*country plant owned* and operated *by the distributor.*"

There are many more things in the Attorney-General's Report. These are enumerated pages 1 to 5 inclusive. Statements and page references contained on pages 1 to 5 inclusive, are as follows:

"(1) Two companies, Bordens and Sheffields, sell 76% of all fluid milk sold at retail in the New York metropolitan area (p. 10).

"(2) With the addition of four more companies whose prices are invariably identical with those of Bordens and Sheffields, these companies sell 90% of all of the milk sold in the retail market of the New York metropolitan area (p. 11).

"(3) Bordens and Sheffields sell 50% of all of the milk sold at wholesale in the same metropolitan area (p. 10).

"(4) Bordens and Sheffields sell 58% of all fluid milk sold in the metropolitan area (p. 10).

"(7) In the wholesale prices of advertised brands of fluid milk, we find no competitive price variation in existence in the New York metropolitan market (pp. 15-16, 92).

"(8) In the non-advertised brands of fluid milk there is found in the wholesale prices evidences of substantial, severe and at times destructive competition (pp. 15, 93).

"(9) Milk is the most important farm product produced in New York State (pp. 18, 19).

"(10) At least 50% of the milk produced in New York State is utilized in milk products other than in fluid form (pp. 19, 20).

"(11) Only 65% of the fluid milk used in the metropolitan area comes from New York State farms, despite the fact that New York State produces more than sufficient milk to supply the requirements of the entire New York metropolitan area (pp. 22-25).

"(15) The Dairymen's League, a farmer co-operative, has 35,155 members whose milk is marketed by it (p. 34).

"(a) This organization sells almost half of its entire supply of milk to Bordens (p. 34).

"(16) The Sheffield Producers Co-operative Association has 13,000 members (p. 42).

"(a) The entire supply of the co-operative is supplied to Sheffields (pp. 41, 42).

"(17) Both co-operatives sell their milk at prices which vary according to the use to which the milk is put (pp. 37, 43).

"(18) *There has never been made an audit by the Dairymen's League, Sheffield Producers, or any other co-operative association of the records of the distributors showing the use of milk in its various price classifications* (pp. 38, 39, 43, 44).

"(a) The audit of these use records of distributors by the New York State Department of Agriculture and Markets has in the case of Sheffield Farms alone resulted in the restitution and savings to farmer producers of about $250,000 over a four-year period (p. 44).

"(19) The prices agreed upon by bargaining agencies formed pursuant to the Rogers-Allen law are, in effect, dictated by the distributors (pp. 49, 51-56).

"(20) *The Borden Company since 1919 has absorbed 54 companies formerly engaged in the production and sale of milk and milk products in the metropolitan area* (pp. 57-60).

"(21) *National Dairy Corporation, the parent of Sheffield Farms, has absorbed, since 1923, 102 companies formerly engaged in the production and sale of milk products in the metropolitan area* (pp. 61-65).

"(22) Analysis of cost was made only on Grade B milk in bottles, since Grade B milk represents the necessity item in the milk business (p. 65).

"(23) The total cost of a quart bottle of Grade B milk delivered to the door was 11½ cents as of February, 1938. The price received by the distributor was 13 cents. The profit was 1½¢ per quart (pp. 97, 98).

"(24) The total cost of a quart bottle of ad-

vertised brands of Grade B milk delivered to the store was 9 cents in February, 1938. The net price received by the distributor was 10½ cents per quart. The profit was 1½ cents per quart, or 16% (p. 98).

"(25) In non-advertised brands, the total cost of a quart bottle of Grade B milk delivered to the store is 8½ cents (pp. 86, 87).

"(a) Due to variations in selling price, profit also varies. In some instances, there is a loss (p. 113).

"(26) The spread between raw milk costs and retail selling price on quart bottles of Grade B milk was greater by 12% in November and December of 1937 and in January and February of 1938 than at any other time in recent years (pp. 110-112).

"(27) In up-state cities the price of Grade B milk delivered to the door was generally lower than in New York City, despite the higher cost of raw milk (pp. 94-97)

"(28) Statements of profits recently issued by both Bordens and Sheffields are misleading in that they do not relate to fluid milk alone (pp. 99-106).

"(29) The prices paid to farmer producers for surplus milk are lowest, whereas the profit which the distributors receive from by-products made from such surplus milk is the highest (pp. 27, 114-117)."

The report on page 88 contains a table showing costs in the wholesale and retail trade. Following the table it says:

"As further proof of the accuracy of these figures of cost it is interesting to note the experience of *two companies selling milk* at retail at 12½¢ per quart in November of 1937 and at *9 3/4 cents per quart wholesale* in that month. *On the basis of those prices these two companies came out without loss. Where discounts or rebates from those prices were given, a loss resulted.*"

The Economic Statement (Exhibit 9 to hearing record, which is Exhibit 3 to stipulation herein), shows that the fluid milk price for November, 1937, was $2.42 per cwt. Accordingly, the Attorney-General's report confirms the Dairymen's League claim that, under the order, 9¾¢ is the absolute minimum delivered cost of a quart of milk in the wholesale trade.

SUPPLEMENTAL POINT III.

The provisions of Section 8c (12) of the Act, permitting co-operative associations to cast the votes of "producers who are members of, stockholders in, or under contract with such co-operative association" in producer referendum, constitutes an unlawful delegation.

The delegation to co-operatives contained in Section 08c (12), constitutes an unlawful delegation of power to co-operatives, and, as applied in the Order, is a violation of the due process clause.

A. As Applied to the Jetter Dairy Company, the Section Delegates to its Chief Competitor, the Power to Regulate the Jetter Company, While Exempting Itself from Regulation.

Jetter and the Dairymen's League both operate country plants; both sell milk to other dealers; both sell milk at wholesale to stores; both *purchase* milk from their producers.[5]

1. The Order *regulates* the *total price* to be *paid* by *Jetter.*

2. The Order *does not regulate* the *total price* to be *paid* by the *Dairymen's League.*

3. The Order does *not regulate* the total *price* to be paid by *Bordens,* which purchases from the

[5] The Dairymen's League is a dealer and purchaser of milk, see page 32 of appellees' original brief.

League, *nor by Sheffields*, which purchases from the Sheffield Producers Co-operative.

4. The Dairymen's League receives special payments of 5¢-23¢-30¢ per cwt. for large quantities of milk under certain conditions. This, under the regulation of Jetter's business, is derived from payments charged Jetter, in excess of total prices charged his chief competitors.

5. To the League *is delegated* the right to cast the votes of producers from which it purchases milk.

6. To the Jetter Dairy Company *is denied* the right to cast the votes of producers from which it purchases.

The general delegation to *producers* of the sole right to vote on an Order may be warranted and might be sustained on the theory that *producers* have a right to fix the prices at which their milk shall be sold.

No such support will be found for *delegating* to a large *distributor*, the *right* to *regulate* the *business* of its *competitors, and*, at the same time, *exempt itself from regulation.* Nor will support be found for a regulation which is so framed as to discriminate in favor of large proprietary companies.

It was this type of situation which this Court had in mind, when it said in the case of *Carter v. Carter Coal Co.*, 296 U. S. 238, at page 311, 56 S. Ct. 855, 873, 80 L. Ed. 1160, at page 1189:

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form. * * * A statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this Court which foreclose the question."

The provisions of the Act for the issuance of marketing orders are asserted by appellee, Central Co-operative, to be invalid in that legislative power is delegated to the Secretary of Agriculture, an administrative officer.

But the Act goes even further than this, and makes the effective promulgation of a marketing order dependent, not only upon the exercise of discretion by the Secretary of Agriculture, but ultimately upon the whims of a limited group of private individuals whose action is required to conform to no prescribed standards whatsoever. It delegates to that group, the power to regulate the activities of other individuals who have different and opposing economic interests. We submit that this, in the language of Mr. Justice Cardozo, is "delegation running riot." *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 553.

While the Dairymen's League, according to various government reports, has a large number of members, it was stipulated by all parties that the *League had only 19,500* producers *in the marketing area* (R. 263). Nevertheless, *it cast more than 22,000 votes for the Order* (R. 219). *This was no accident.* The League cast votes in excess of the number of producers with which it had contracts, as a safety margin to put across its program.

B. As Applied to Appellees, Rock Royal and Schuyler Junction, the Section is Discriminatory, and an Unlawful Delegation.

These appellees are co-operatives. The power delegated to the League, affects the co-operative appellees in two ways, as follows:

1. It enables the larger co-operatives to regulate the affairs of the unwilling smaller co-operatives.

2. It permits the Dairymen's League, as a distributor, to discriminate against its own producers; to underpay them and use such underpayment to engage in destructive price cutting, to the general demoralization of the market. *League producers*

have no vote. Their votes are delegated to the League.

These appellees cannot and do not complain of discrimination against League producers, as such. They complain of use of such discrimination to break down the market, thereby affecting appellees.

Were a League producer a party to this action, he could complain of the discrimination on his own behalf. Appellees have a right to urge this discrimination because the same act discriminates against them.

The motives of Congress in passing legislation *cannot* be inquired into. Very likely, the Dairymen's League was instrumental in procuring passage of this provision, which was designed to fit its purposes, even as it was the actual proponent of the Rogers-Allen Law.

However, this Court *can* inquire into the *legality* and effect of the Section, regardless of the sponsor or motive back of its passage. We urge that it constitutes an unlawful delegation of powers, contrary to the actual intent of Congress that *producers should, themselves, approve or disapprove* an *Order*, and *contrary* to the *intent* that *distributors should have no vote thereon.*

SUPPLEMENTAL POINT IV.

The order is the culmination of almost twenty years of attempts by the League to establish itself, a private monopoly.

The League, in its brief, pages 12 to 31, gives the Court a bland portrait of the League as a true co-operative and benefactor of producers. It outlines its alleged charitable and co-operative acts and aims down to the adoption of the Order. Such a picture has always been before the public. The record in this case shows conclusively, the widespread and well organized publicity and propaganda bureaus of the League and its child,

However, let's look at the record. It is a history of oppression of producers and an aim at private monopoly.

A. The Dairymen's League Instituted its Program to Dominate All Producers and Dealers in 1922.

On April 1st, 1922, the Dairymen's League presented to all dealers in the Metropolitan Area, a proposed contract which discriminated against any producer who did not sign the League contract. *Producers were contractees* of the League, *not members* (*Dairymen's League Co-operative Association, Inc., v. Holmes,* 207 A. D. 429, affirmed N. Y. Court of Appeals, 239 N. Y. 503). This program was the subject of litigation in the case of *Barns v. Dairymen's League Co-operative Association,* reported (N. Y.) 220 A. D. 624, 222 N. Y. S. 294. The plaintiff, Barns, was a producer selling milk to Bordens, where he had been a patron for many years. He refused to sign the Dairymen's League pool contract, and was excluded from selling to the Borden Company.

In that case, the Borden Company urged, and finally required, its producers to sign League contracts. The activities of the Bordens were held not to be illegal, and the discriminatory practices of the League were held to be exempted from operation of the State Anti-Trust Law. The case did not go to the Court of Appeals, and remains the State Law on the subject of legalizing discriminatory and monopolistic practices by co-operatives, which are challenged here. In the *Barns* case, the Court said at pages 301, 308, 309, 310, 22 N. Y. S. 294:

> "*These contracts gave the Co-operative a monopoly of the highest priced classifications to the extent that it was able to fill the same by its deliveries, and to the extent of the market controlled by its several contracting distributors.* This contract was entered into by a large number of the members of the New York Conference Board, although a good many of them declined to accept it and bought from outside sources. The defendant the Borden Company signed this contract in March, 1922.

"*It is true* that the *Dairymen's League Co-operative Association has contracted with the Borden Company* and other distributors *in such a manner that all the milk but that produced by its members is excluded from the New York market, so far as it is controlled by the purchasers from the league.* This does not, however, pre-empt the entire market by any means. The association does not control more than 50 per cent of the milk produced in the New York milk zone, nor do its distributors control more than 50 per cent of the fluid milk sold in New York City. There are other very important distributors, who are buying non-pooled milk.

"The plaintiff complains that he has been shut out of this market. *It does not appear that he has been actually shut out, but, even if he has, it is a question whether he has any vested right to enjoy this preferential market.*

* * * * *

"If the plaintiff here were absolutely cut off from reasonable access to any market whatever, even the cheese factory, I think the law might properly intervene; but as it is it seems to me that such restriction as is caused by the Co-operative Association and its contractees is well within the limits permitted by law.

* * * * *

"It does not appear in the evidence that any producer has been put out of business or deprived of a market, although the plaintiff and doubtless many others have been compelled to change their market, and possibly have been put to some inconvenience and some loss. It may be that some of them have been deprived of the opportunity of selling in the New York market, and have had to sell for manufacture at a less price; but as it has been before pointed out this is a burden which must be carried by somebody, because there is a large surplus over and above what can be consumed as fluid milk.

* * * * *

"A month or more prior to April 1st it was apparent that a large majority of the regular Bor-

den patrons had become members of the Co-operative Association, and that 80 per cent of its Grade A milk purchasers were members; grade A milk being an important feature of the Borden business. It had the alternative of either shutting off such of its old patrons as did not join the pool, or else shutting off those that had joined and going out after new ones. The great preponderance of poolers among its patrons seemed to settle the matter, and it made its contracts with the pooling association.

"To the extent that the Borden Company urges its patrons to join the pool, it was perhaps taking sides in the controversy; but it does not appear that it did this until a large majority of its patrons had already joined, and it does not seem unreasonable that it might try in this way to keep all of its old patrons that it could." (Emphasis supplied.)

The object of the agreement under attack in the *Barns* se was to put all dairymen into a market-wide pool der domination of the League.

In the case of *Dairymen's League v. Holmes, supra,* e League, with the co-operation of the dealer to whom olmes Brothers delivered, had forced them to sign the ol contract. From May 1st, 1921, to March 31st, 32, the dealer (Clover Farms, Inc.), paid the League ,207.77, for Holmes Brothers milk, of which they re-ived only $3,329.45.

When they found another market and left the League, e month before the expiration of the year the contract s to run, the League withheld payment to them of 77.23 then due them for milk (at reduced League ices) and in addition, sued them for $1,200 penal-s. The Court in the opinion pointed out that the over-ad cost of the League pro-rated against their milk r 11 months, was only $73.03. The Appellate Divi-on reversed the judgment of the lower Court against e Holmes Brothers, and directed judgment in their vor for the amount of $377.23, the amount due them r their milk. The Court of Appeals sustained the Ap-

pellate Division *on the ground* that Holmes Brothers, under the League contract, *were not members* of the League.

The League then included in its contract, paragraph 16 (printed page 11 of appellees' original brief), which recites that

> "the producer hereby applies for membership * * * in case this contract is cancelled * * * to deem such cancellation a withdrawal from membership in this Association."

After such change, the League was able, by the extreme penalties provided by the contract, to keep producers whipped into line.

Wherever they could force producers to sign a League contract, the penalty of escape was so severe that they remained in line, or suffered severe loss.

In the case of *Parker v. Dairymen's League*, 222 A. D. (N. Y.) 341, 226 N. Y. S. 226, the League was sustained in collecting these penalties on the theory that the producer was a member. In that case, when Parker found an avenue of escape, he was obliged to forfeit $503.48 which was then due him for milk. The case never went to the Court of Appeals. No doubt, the Court in rendering this judgment, was largely influenced by the policy of "encouraging co-operatives." It refers in the opinion to the fact that these penalties are inflicted as liquidated damages authorized by Section 209-a of the Membership Corporations Law of New York State. The Court said in that connection (quoting from 226 N. Y. S. 231):

> "* * * It was provided by section 209-a of the Membership Corporations Law *that the by-laws of such a corporation* as the defendant *might fix* as liquidated damages specific reasonable sums, in amounts fairly related to the actual damages ordinarily suffered in like circumstances, to be paid to the corporation to reimburse it for any damage which it or its members might sustain

by the failure of any member to perform any obligation to the corporation under the certificate of incorporation, the by-laws, or any contract with the corporation, and that any such provisions should be valid and enforceable in the courts of this state. This provision is now contained in section 37 of the Co-operative Corporations Law. The stipulation for liquidated damages contained in the contract was also covered by a by-law of the defendant."

We have already pointed out that the producer who finds himself obliged to sign the League contract, by the provisions of that contract, *"agrees to comply with all the requirements of the By-Laws of said Association"* (paragraph 16 of contract, appellees' brief, page 111).

These By-Laws were made before producers were allowed to become members. Their chance of changing them is very remote.

This Court may recall that a few years ago, the Rockefeller family sought to remove the head of one of the Standard Oil corporations. The Rockefellers controlled many shares of stock. They found it most difficult to remove an officer who was guilty of a breach of trust. The owner of a hundred shares of Standard Oil would have found it impossible. So here, a producer would find it impossible to remove a single director or officer of the League or to amend its By-Laws in any respect not approved by the directors and officers in control.

The *Parker* case was decided in 1927.

In 1933, we had the Milk Control statute of the State of New York (Chap. 158, Laws 1933, as amended). By its provisions, it exempted co-operative corporations. To meet competition of co-operatives which were exempted, milk was, in increasing quantities, imported from other states, not subject to this regulation. In the case of *Baldwin v. Seelig,* 294 U. S. 511, this Court held that such milk imported from foreign states was not subject to the New York State Control Law.

The *Seelig* case, and lack of control of interstate milk, has been blamed for failure of Milk Control. Conceivably, interstate milk might have eventually destroyed the Milk Control Law. However, *the exemption of co-operatives under that law, was the inducement which led dealers to buy additional milk from foreign states*, and thereby increase the surplus in the Metropolitan market.

As anyone knows, a competitive advantage, whether gained by exemption of co-operatives or by exemption of interstate milk, was bound to defeat New York Milk Control.

In the present situation, a competitive advantage, whether by "unpriced" milk (which occupies the same position as interstate milk did in the *Seelig* case); by exemption of co-operatives; by preferential payments from the capital of certain handlers to other handlers, or otherwise, was bound to defeat the Federal-State regulation, which amounts in reality to Federal and State control.

The report of the Joint Legislative Committee to investigate the Milk Control Law (New York Legislative Document, 1937, No. 81, dated March 22, 1937), in discussing failure of Milk Control, contains the following statements (pp. 14, 15 and 16):

> "INTERSTATE MILK NOT BEING GOVERNED BY THE MILK CONTROL LAW HAS CAUSED NEW YORK STATE PRODUCERS TO LOSE THEIR FLUID MARKET TO A CONSIDERABLE EXTENT.
>
> Producers always seek to market their milk in the area where it is used for fluid purposes. This is very obvious as the return to the producer in this field is the most lucrative. Therefore, the New York metropolitan market dominates the marketing situation for all milk produced in New York State.
>
> With the enactment of the Milk Control Law and the fixing of minimum prices, the delivery of milk from without the State to the metropolitan area increased. Some of the distributors pur-

chasing from without the State complied with the prices set by the control board whereas others did not. *The practice of not paying control board prices gradually increased.*

* * * * *

This situation, which was getting progressively worse, was being tolerated until a bombshell struck which caused the paralysis of the New York State producers fluid market. It was the decision of the United States Supreme Court in the case of *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511. The Court held, in substance, that New York State could not fix the price for milk coming into this State from another state.

Immediately the importation of milk into the metropolitan area produced in other states or produced and shipped through another state to give it the status of interstate milk increased tremendously and came into this valuable market like an avalanche, crowding out the intrastate milk governed by control board prices. It has reached such great proportions today, that at least 40 per cent of the fluid milk consumed in the metropolitan area is interstate milk and is not governed by the Milk Control Board.

* * * * *

The Milk Control Law has Broken Down Completely in the Metropolitan Area and is Incapable of Effective Enforcement.

The influx of interstate milk into the metropolitan area has increased from 30 per cent until it approximates at least 40 per cent of the fluid market. This has been the primary cause in the breakdown of the enforcement of the Milk Control Law. The State of New York is attempting to control prices in the market where it has control over the price of only 60 per cent of the product supplying that market. *Obviously, any dealer who can buy his milk supply outside the State of New York at prices less than those fixed by the State Control Board will benefit financially* by bringing the product into the State and selling it at the same price or lower than the control price under

which legitimate dealers of the State are operating.

Retail dealers and grocers in the metropolitan area have been purchasing their milk from four or more dealers at the same time. Included among the dealers were those purchasing their milk from without the State. *These dealers in interstate milk were able to sell their milk to the grocers at below milk control prices and yet make a handsome profit.* The other dealers who dealt in intrastate milk were threatened with a loss of this business unless they met the price set by the dealers in interstate milk. Faced with the dilemma of losing their market or violating the law, the dealers chose the latter. The means used was by charging the milk control price on the bills and then giving the grocers rebates for the difference." (Emphasis supplied.)

Accordingly, *failure of Milk Control, is now accredited to competitive advantages held by dealers purchasing interstate milk, which was not subject to the price fixing regulations of New York State.*

The complexity of League operations in many markets, with plants in many states, as well as its exemption, was unquestionably a leading factor in the break-down of Milk Control.

The Legislative hearings above referred to, were held during the pendency of the Rogers-Allen Law before the Legislature (Chap. 383 of the Laws of 1937).

The Dairymen's League was undoubtedly in charge of the legislative program and subsequent promulgation of Order No. 27. Indeed, appellant's brief, page 43, says:

"It was conceded by appellant that the League actively sponsored and supported the passage of the Rogers-Allen Law (New York, Laws of 1937, Chapter 383) (R. 374), and that the Bargaining Agency submitted to the Secretary and to the Commissioner the proposed Orders on which hearings were held (R. 263, 273). The League and the Sheffield Producers' Co-operative are both members of the Bargaining Agency (R. 263). *One of the attorneys for the League drew the first draft*

of the proposed Order and submitted it to a lawyers' committee consisting of four members, one of whom was attorney for the League, and one of whom was attorney for the Sheffield Producers' Co-operative" (R. 374). (Emphasis supplied.)

Milk Control was ended on the theory that price fixing as an evil. The Legislative Report above referred to, tated on page 15:

> "*The majority of producers marketing their milk in the metropolitan area favor the abolition of the price fixing:* They anticipate that there will be a temporary price war when the law is repealed, *but they feel their distributor will be able to recapture their lost percentage in the fluid market, and pay the producers a better blended price.*" (Emphasis supplied.)

The Rogers-Allen Law was signed and in effect May 9th, 1937. The Bargaining Agency, which was sponsored y the Dairymen's League, was incorporated June 7th, 937 (R. 128), and shortly after its incorporation, the airymen's League and Sheffield Co-operative became embers thereof, *id.*

The following month, July, 1937, E. M. Harmon (pres-nt administrator of Order 27), then employed by the airy Section of the U. S. Department of Agriculture, ddressed the Agency with reference to "government aid a marketing program" (R. 147).

This was followed by preparation, between said time nd November, 1938, of a proposed marketing order by llen Miller, attorney for the Dairymen's League. This as the proposed marketing agreement, which he proaced and submitted to a committee of attorneys apointed by the Bargaining Agency on October 25, 1937 (R. 47).

In other words, the Dairymen's League procured the assage of the Rogers-Allen Law and abandonment of tate Milk Control, on the theory that "the majority of roducers * * * favor the abolition of price fixing."

Actually, its purpose was to procure discriminatory price fixing through a Federal Order, and to effectuate the same so that independent dealers had no means of meeting competition of those receiving preferential treatment and competitive advantages under the Order.

The Rogers-Allen Law was sold to Governor Lehman and his signature obtained by a representation that "this Bill (Rogers-Allen Law), returns milk control to the milk industry, where it belongs." Such declaration was contained in the Governor's memorandum made upon his signing the bill. The Governor said:

> "This bill was substantially modified during the course of its consideration and passage by the two houses of the Legislature. It places upon producers themselves the duty and responsibility of doing something to stabilize the industry and of devising machinery to assure the producer a reasonable price for his milk."
>
> • • • • •
>
> "It does not *give distributors control* of the industry. Control under this bill is kept with the producers."
>
> • • • • •
>
> *"The bill permits collective bargaining between distributors and producers. It affords opportunity for the industry to demonstrate that it is again competent to manage its own affairs.*
>
> It is, however, evident to me that *successful operation under the bill will depend largely on the degree of co-operation that is given by producers and distributors alike.* A spirit of understanding and of *fair dealing* will go a long way to improve conditions in the milk industry. A spirit of *obstruction* or *of individual self-interest* will render the bill largely ineffectual.
>
> • • • • •
>
> "The bill is approved.
>
> (Signed) HERBERT H. LEHMAN."

(Emphasis supplied.)

e industry was practically given to the Dairymen's eague; the purpose of the measure was not to abolish rice fixing, nor to return "milk control to the milk ndustry, where it belongs." The Governor's signature as hardly dry on the bill, when the machinery was arted to create discriminatory price fixing, with a re-ultant private monopoly in the Dairymen's League, Bor-ens and National Dairy, with a probable later struggle etween those three for supremacy in the field when the naller independent proprietary handlers and co-opera-ves had been forced out of business.

The proposed marketing order was in preparation by airymen's League attorneys almost immediately. Doubt-ss, the groundwork had been schemed out and accom-lished prior to the Legislative Report of March 22nd, nd the subsequent enactment of the Rogers-Allen Law.

The history of the Order discloses a continuation of he 17-year old program by the Dairymen's League, to ut all producers under its domination and all distributors bject to its will.

By preferential payments to itself out of the Producer ettlement Fund, and by exemption of itself from com-liance of the Order, it has its competitors at its mercy. hose whom it does not choose to destroy, must eventually bandon their present sources of supply (including all ppellees) and producers delivering to them, will have to o into the League or out of business.

If any escape, they will have to contribute to the sub-dy paid the League, Bordens and Sheffields under Article II, Sections 5 and 6, and to producers in 18 preferred ounties (mostly in the League or Sheffield Producers As-ociation) under Article VI, Section 8, to whom the chief enefits of the fluid market have been bequeathed.

All of this is in the name of co-operation. The League roclaims that it may now, by statute take unto itself, as co-operative, the property of others and to take away eir personal liberty.

The tenor of the League brief is in effect—"*certainly we enjoy these competitive advantages. We are entitled to them.*" In the language of the street, "so what?"

The Federal Trade Commission Report, *supra*, page 38 states that the Sheffield Producers Co-operative is controlled by the Sheffield Company. Concessions to Sheffields, is sharing with it the market service payments and the benefits of "unpriced" milk, may account for the presence of Sheffield Producers in the Bargaining Agency.

This new found friendship may account for the Sheffield Producers promptly receiving upwards of $16,000 in payments under Article VII, Section 5 (R. 137, details our original brief, page 25), whereas the Clinton County and Worcester bona fide farmer-owned co-operatives could not get either the 5¢ provided for under that Section, or the service payments for milk actually diverted in the coercive program of the League (R. 305-378-9).

This program has become a *League-Borden-Sheffield Axis,* comparable to the recently formed *Rome-Berlin-Toyko Axis.* It is a triple play—"Tinker—to Evers—to Chance."

In the high pressure propaganda to put over this program, we find terms which have recently become of daily use. We find that farmers are "angered" by the appearance of anyone in opposition to the Order; their "patience is exhausted"; "they won't wait long" (R. 560, 568, 569).

Two years ago, Mussolini was "angered" by the Ethopians; his patience was exhausted; more recently Herr Hitler has been frequently "angered." His "patience is exhausted." He is championing the cause of oppressed minorities. The League, to an equal extent, and no more, is championing the cause of the producer.

B. The League Did Not Wish this Scheme to be Tested in the Courts. It Attempted to Prevent the Appellees From Resorting to the Courts for an Adjudication of Their Rights.

Surprising, even in this day, has been the program of the Bargaining Agency and the League. Fearful that the Courts, if the true facts concerning the Order were uncovered, would invalidate it, means were taken to prevent, by physical force, if necessary, any handler litigating this matter in Court.

The details of this program are partly set out in the Findings, which quote to a very limited extent, the activities of the League, Bargaining Agency and their associates to accomplish this end (Findings 86-95, R. 153-158, inclusive), which are as follows:

> "86. The purpose and effect of said program and Order was to give to the Dairymen's League a competitive advantage over its competitors, including the defendants, and to create in said Dairymen's League and in the Bargaining Agency, and in handlers buying milk from them, to the exclusion of the defendants and all others, the control of fluid-milk business in the marketing area. To that end, the Dairymen's League, Bargaining Agency, and *E. Manning Gaynor (herein referred to as Gaynor), who was personal representative of intervening plaintiff Noyes, entered into a conspiracy to establish* in said Dairymen's League, Bargaining Agency, and dealers purchasing milk from Bargaining Agency members, including Dairymen's League, *an illegal monopoly* in the purchase and sale of milk in said marketing area.
>
> "87. One Charles H. Baldwin, acting individually and as Executive Secretary of the Bargaining Agency herein called "Baldwin," one Homer Rolfe and one Jay C. Treat, acting individually and as President and Secretary, respectively, of the intervening plaintiff Bargaining Agency and intervening plaintiff Dairymen's League, uttered and published certain letters, pamphlets, official newspapers, to wit: The Bargaining Agency News and the Dairy-

men's League News, *which said letters and other printed statements contained threats against any dealers who might appeal to the Courts for any adjudication of its rights, and entered upon a campaign to compel distributors and dealers of milk in the same position as defendants to sign contracts which surrendered their rights to due process.* Said printed utterances were circulated among producers.

"88. Gaynor procured one Faulkner, a producer delivering milk to defendant Jetter, to visit said Gaynor at Leonardsville, N. Y., and there requested Faulkner to arrange for withholding milk of the defendant Jetter unless it signed a marketing agreement; said Gaynor requested one Dake to withhold delivery of substantial quantities of milk from Eisenberg Farms, Inc. Said Dake withheld said milk until said Eisenberg signed, and then released the milk. Gaynor told Eisenberg that his milk would be released when he signed a marketing agreement in the Administrator's office. Eisenberg signed at the Administrator's office, and his milk was released.

"Baldwin, executive secretary of the Bargaining Agency, solicited one Dumont, who had been active in a milk strike during 1937, to apply to the Market Administrator for a "job," which was to include visiting localities where dealers "refused to go along with the Order" and "drying up" the milk stations of such dealers by withholding milk until they complied.

"89. Said Gaynor, in public speeches and privately over the telephone, threatened and caused to be threatened, all dealers, with summary withholding of their milk supplies, unless they signed marketing agreements.

"90. On August 29th, 1938, E. H. Baldwin, acting individually and as executive secretary of defendant Bargaining Agency, caused to be issued and distributed to producers delivering milk to defendant Jetter and to other producers in the marketing area, a letter, which letter contained the following:

" 'Dear Producer: Before you receive this letter, a Federal-State Milk Marketing Order covering

the Metropolitan New York Milk Market, will have been signed by the President. This Order will, no doubt, become effective September 1st.

"'To the casual observer, a wonderful battle has been won, but we, who have known the opposition, realize that the real battle is ahead.

* * * * * *

"'As you know, the dealers in Boston took the Boston Order into Court and have held up its full operation for over a year. Over two million of the farmers' money has been held up by the dealers.

* * * * * *

"'*This producers can stop by inducing dealers to consent to the operation of the Order as an agreement. Your dealer, by such consent, voluntarily refrains from using the Courts to block the Order. * * * We want results throught compliance with Order, not law suits.*

* * * * * *

"'You will be contributing greatly towards that end if you singly or collectively with other producers *insist that your dealer co-operate with others in signing this order at once.* If you have not already done this, won't you please take care of it immediately?

"'Won't you also co-operate with me by giving your advice on questions that you will find on the enclosed page?'

"Attached to said letter was purported questionnaire, which in part contained the following:

"'Questionnaire to be returned to C. H. Baldwin, Ex. Sec., Metropolitan Co-Operative Milk Producers Bargaining Agency, Inc., Room 118, Onondaga Hotel, Syracuse, N. Y.

"'1. Can you stand continued low prices while dealers argue this matter out in the courts?

"'3. *In your opinion are farmers in your community ready for a movement to compel the buyers to sign the Order, pay the price and live up to its terms?*

"'6. Will you support the Bargaining Agency in that move if others will?

"'7. In Boston the dealers tied up over two million dollars of the farmers' money in the courts. Do you think farmers will work together to prevent dealers here from doing this?

"'NOTE.—The information on this questionnaire will be held in the strictest confidence by me, and your name will no tbe used in any way.'

"91. On September 21st, 1938, Jay C. Treat, individually and as an Officer of the intervening plaintiff, Bargaining Agency, issued a letter which was circulated throughout the New York Milk Shed, and among producers delivering milk to defendant Jetter. This letter stated in part:

"'almost every dealer in the Metropolitan Market has signed the agreement. In some instances, it has been necessary to exert producer pressure and the willingness of producers to co-operate in withholding or offering to withhold their milk until their dealer signed has been encouraging and gratifying.'"

"92. During the early part of September, 1938, Gaynor was principally engaged in directing producers and co-operative associations in a program of withholding milk from dealers who refused to sign the proposed agreement, or who did not make reports and comply with the Order. Milk which was so withheld was chiefly diverted to the intervening plaintiff Dairymen's League, which acted in concert and in co-operation with said Gaynor.

"In the weekly newspaper of the plaintiff Dairymen's League, known as the 'Dairymen's League News,' and particularly in the copy thereof dated September 6th, 1938, on the first page thereof, was contained the following statement:

"'DEALERS SIGN UP

"'Fred H. Sexauer, president of the Dairymen's League, estimated the new program would raise League members' September returns $1,000,000 over what they receive for August milk.

"'More than 75 per cent of New York's milk supply was under voluntary agreement when the plan began operating. Included were distributors buying from the Dairymen's League. They handle

40%—approximately 50,000 cans daily—of the market's supply.'"

"On page 14 of said issue, was the following statement:

"'NO FOOLIN',' Say Sub-District 17-A Members

"'At the August meeting of sub-district 17-A, held in the Congregational Church at Kiantone as guests of Kiantone and Fresburg Locals, delegates and associate delegates informed Director Grout in no uncertain terms that the membership of the sub-district will not allow dealers to nullify the benefits of the new marketing Order, by passing unanimously the following resolution:

• • • • • • •

"'Whereas, in Boston with a similar order dealers have tied up the cream of the milk check in court litigation, and threats of similar actions are circulated in this area: Therefore be it

"'Resolved, that sub-district 17-A in regular meeting ask and demand that our Association and officers insist on our full rights from the start of the State and Federal Marketing Order, and be it further

"'Resolved, that all dealers be required to give satisfactory proof of the acceptance of the terms of the order, or no milk be sold them and in carrying out this plan, we pledge our officers our cooperation and support in agreeing to any diversion necessary to accomplish their purposes.'"

"On page 15 of said issue, the *M'rket Administrator, Harmon,* was quoted as saying:

"'It is my duty to administer the rules and regulations that have been formulated and approved by producers. It is my purpose to do just that, and to do it to the best of my ability. *This may at times not be to the liking of some people, some may be made unhappy.*'"

"93. In the issue of the Dairymen's League News of September 20, 1938, the following item appeared on the front page:

"'Producers Ready to Divert Milk from Non-Complying Dealers

"'League Gets Vote of Thanks from Bargaining Agency for Its Offer of Marketing Facilities.

"'Volunteer enforcement agents—100 strong—were riding the roads last week explaining to farmers how they could convince recalcitrant metropolitan milk handlers of the advantages of complying with the law by obeying the rules and regulations of the new federal-state marketing program.

"'This action followed a meeting of delegates of the Metropolitan Co-operative Milk Producers' Bargaining Agency in Syracuse, September 10. *The delegates voted to have 100 farmers go out as volunteer enforcement agents to 'crack down' on dealers who have not signed the marketing agreement.* They were to explain to producers delivering to such dealers that they could divert their milk and not lose money. Such diversion it was believed would quickly bring the few New York holdouts into line.'

"The same article on pages 1 and 2 quoted Gaynor as follows:

"'*In a spirited speech, Mr. Gaynor told the dairymen that they 'need not think about dealers for two minutes.'* He explained the provisions for diverting milk from dealers who fail to comply with the regulations. 'The Dairymen's League plants are open—and others too,' said Mr. Gaynor. *'Call me up, I'll tell you where to put the milk. You won't have to divert very long before these dealers will be ready to sign up.'*"

"The Dairymen's League News of September 27th, 1938, on the front page thereof, contained the following statements:

"J. C. Treat, secretary of the New York Metropolitan Co-operative Milk Producers Bargaining Agency, made the prediction in Syracuse that all the larger dealers would be signed up by the end of last week. Except for a few small handlers, Mr. Treat predicted the sign-up would be almost 100 per cent. None of these smaller dealers handle more than 50 or 75 cans a day and practically all of them are in the 'spot buyers' class, he said.

"Mr Treat also reiterated a former statement made by the Bargaining Agency *to the effect that the squad of 100 producer volunteers were still on duty in the milk shed and that shipments of milk would be diverted from those buyers who declined to pay full prices* as called for by the order or

who might attempt through court action to obstruct administration of the order."

"The foregoing quotations constitute only a small part of the program of propaganda carried on by the intervening plaintiffs Dairymen's League and Bargaining Agency.

"94. In the October 11th issue of the Dairymen's League News, on the first page thereof, was contained the following:

"'Producers Stop Dealer's Milk—He Signs Up

"'Buffalo Milk 70% Under New State Order—Bargaining Agency Puts Pressure on Procrastinators.'

* * * * *

"'Producers Prepared for Non-Compliers

"'N. Y. C. Marketing Order Calls for Dealers' Reports Oct. 10

"'Preparations to apply "farmer pressure" to any milk handlers who fail to comply with requirements of the federal-state milk marketing agreement were being formulated last week by the Metropolitan Co-operative Milk Producers' Bargaining Agency.'

"On page 2 of said issue, was contained the following statement:

"'The farmer's opportunity lies in mass action through business co-operative organization. Farmers today depend more and more on their own responsible leaders for information. Elected co-operative leaders must know reasons for low prices and be prepared with constructive plans.'

"95. In the 'Milk Producer's Market News.' the official paper of the plaintiff Bargaining Agency, for the month of October, 1938, published prior to October 15th of said month, and copies of which were distributed generally to the producers delivering milk to defendant's (Jetter's) plants, were contained among others, the following statements:

"'Please bear in mind that our able Secretary,

J. C. Treat, who is in charge of the "MINUTE MEN," is doing a fine job and these men, who are distributed throughout the milk shed, are on the watch at all times for disturbances, chiseling and other items that are not for the best interests of your producers.'

"Page 18:

" 'Remember that in the last issue of the Market News, on the front page, your writer advised you producers to watch out for the small minority of trouble makers and see to it that they are kept in their place. *We also suggested that whenever you find one of them sticking their nose in the picture and trying to disrupt what you have approved, then a good idea is to swat the nose and talk afterwards.*'

"Page 24:

" 'Pressure Is Put on Milk Dealers

" 'Syracuse, N. Y., October 13 (A. P.).—Milk producers supplying the New York City markets began withholding milk today from dealers failing to abide by provisions of the federal-state marketing agreement.

" '*The producers diverted 1,300 cans from a New York dealer who, E. M. Harmon, administrator of the agreement, said, failed to file the first monthly report of milk sales.*

" 'Homer S. Rolfe, president of the Metropolitan Co-operative Milk Producers Bargaining Agency, said the agency ordered the milk diverted from the dealer to cheese plants. The agency, he added, will pay the difference between the cheese plant price and the price they would have received from the dealer.'

* * * * *

" 'Some mighty fine work has been carried on at Bridgewater * * * by the leaders in the past few weeks.

" 'An orchid to Eddie Gaynor, of Leonardsville, who is doing some mighty fine work in assisting the groups working for the success of the Federal

Order. We want to welcome the Young-Maybery Co-operative Association, one of the new members of the Bargaining Agency. They start off with over 200 members.'

"Page 25:

"'The Bargaining Agency, plus, Treat, plus Baldwin, plus Andover Co-operative, created a headache for what large New York dealer?

"'Secretaries of all Co-operatives—We have added nearly 2,000 names to the individual mailing lists since the last issue was sent out. If you have not already sent in your list, do so at once and you will no longer be bothered with the bundles of Market News and the troubles of distributing same.'

"Page 28:

"'Hot Stuff.'

* * * * *

"'We farmers are like the tramp who stopped at a lady's door and asked for something to eat. She gave him some bread and said: "Now, I don't give you this bread for your sake, but for the Lord's sake." The tramp looked to the dry bread and turning to the woman, said: "Then for Christ's sake put some butter on it." Now, if the dealers won't give us a living price for milk for our sake, perhaps they will for Christ's sake. Not bad!'

"The reference to the 'mighty fine work' alleged to have been carried on at Bridgewater refers to activity among patrons delivering milk to the defendant Jetter.

The Jetter Company was obliged to institute suit to estrain interference with its milk supply, in order to ave its rights adjudicated in the U. S. District Court. his is referred to in the Dairymen's League News and lso in Findings Nos. 96 and 97 (R. 159) *as follows:*

"96. Sub-district president of plaintiff Dairymen's League (Dist. No. 11), has canvassed producers delivering to defendant Jetter, since Sep-

tember 1st, 1938, and represented to such producers, that payments for their milk were in danger; that said producers should leave Jetter and deliver milk to the plaintiff Dairymen's League before such procedures sustained loss of payment for milk delivered.

Plaintiff Dairymen's League, with knowledge that the defendant Jetter and other similarly situated, could not survive continued enforcement of the Federal Order when accompanied by the destructive competition of the League, the National Dairy and Borden subsidiaries and affiliates, in the October 11th issue of the Dairymen's League News, printed the following statement:

"How Can the 'Cheap Milk' Dealer Pay!

"Apprehension was felt in some quarters that some producers may receive something of a shock when they get paid for their milk.

"This uneasiness was due to the fact that it is well known that a lot of milk is being sold to stores in New York City at less than cost. There is a considerable question as to whether some of the firms selling this milk cheap will have money with which to pay producers at the rates established by the market administrator."

"97. The Market News issued by the Bargaining Agency for December, 1938 (Exhibit 23 to stipulation), states on page 30:

"'Syracuse, Nov. 21.—There will be no let up in activities of the Metropolitan Co-operative Milk Producer's Bargaining Agency to obtain full compliance with the Federal-State milk marketing program, declared Charles H. Baldwin, Executive Secretary today.

"Mr. Baldwin made this statement following a conference with his attorney, Edmund F. Cooke, and other lawyers who argued against an application by Jetter Dairy Company to restrain Mr. Baldwin, the Bargaining Agency and the Dairymen's League Co-operative Association before United States Judge Frank Cooper in Albany Saturday.

"'The Jetter Dairy sought to restrain these de-

fendants and Metropolitan Market administrator E. M. Harmon and officials of the State Department of Agriculture and Markets from enforcing the marketing program which was instituted September 1 under The Rogers-Allen law and the Agricultural Adjustment Act.

* * * * *

"'The Jetter case marks a new milestone in the progress of New York Milk Shed dairy farmers. Never before have dealers sought to enjoin farmers, although there have been cases where dairymen have had to seek protection of the courts from the acts of dealers. Starting of this case seems to indicate the desperate desire of dealers to wreck this program and frighten producers into acceptance of less money for their milk. The effect, however, will be the opposite. *Indignation is running high* among farmers all through the State, and I believe they will now be more insistent than before that every dealer comply in every respect with this marketing program, which has already added more than $2,500,000 to dairymen's income.'"

Notwithstanding the order granted against the Bargaining Agency and the League to restrain those activities, attempts were made to put Jetter out of business just the same. This is shown in the testimony of witnesses Wilson (R. 283) *and Faulkner* (R. 287).

The Jetter complaint and restraining Order in that case, are not in evidence in the case at bar.

Dairymen's League had progressed so far with its program of coercion, that one milk handler was ordered to deliver his milk to the Dairymen's League without so much as consulting him (R. 378). While the handler declined, at the instance of Mr. Gaynor, he later diverted the milk, in order to compel another dealer to sign a marketing contract (R. 379).

Witness Dumont testified that Mr. Baldwin, executive secretary of the Bargaining Agency, offered him a job with the Administrator. He went 200 miles to Syracuse

for this conference. Mr. Harmon was there, but had no talk with the witness. The job was to "dry up" milk plants of dealers who did not "go along" with the Federal Order. He refused the job; received $20 for his trip, paid by check of the Bargaining Agency (R. 396, 397). Judge Cooper agreed that this testimony was not binding on Administrator Harmon or the Government, but allowed it to stand as showing the general situation.

Attorney Walter Kohn testified (R. 333) that he went to Administrator Harmon's office in New York City. There he saw Mr. Treat, Secretary of the Bargaining Agency, and Mr. Mather, Sr., attorney for the Department of Agriculture (R. 333). Kohn discussed threats of closing up plants belonging to a handler client of his for refusal to sign a marketing contract.

Kohn was about to file a petition for review as provided by Section 608c (15). He detailed his conversation in the Administrator's office, as follows (R. 334):

> "This was the conversation. I said, 'Mr. Mather, I represent these gentlemen, the Cooperdale, and *we would like to test out the question*—I would like to test it out as they did in Boston. *I have my petition ready for filing with the Secretary of Agriculture, and following the precedent set down in Boston, I would like to know if you will* begin the action, because I can't begin the action until after there is a hearing on my petition.' He replied that the Department of Justice took care of that, 'but I can tell you now that that won't be for quite some time.' Then Mr. Treat said, *'It won't take very long you will get no milk.'* I said, 'Well, Mr. Mather, that was one of the things that I wanted to speak to you about because we received word from the Co-operative that was supplying us with milk that *if we tested out this question or went to court, they would stop giving us milk.' Mr. Treat said, 'That's right.'* Then I said, 'Mr. Mather, would you stand by and permit a thing like this to be done, merely because we

wanted to test out the question to see whether we had—whether legally it was good, or not?' He said, *'Not only would I stand by, but I would stand up and cheer.'*'' (Emphasis supplied.)

Treat was at Gaynor's house when diversion was talked (R. 378).

The League and Bargaining Agency had very close co-operation from the Dairy Section of the Department of Agriculture and Commissioner Noyes' personal representative, Gaynor.

Solicitor Jackson on the argument, said in substance that Judge Cooper had found the Secretary of Agriculture guilty of conspiracy. Mr. Jackson was misinformed on this subject. Judge Cooper made no such statement in his opinion. He did point out that these matters very likely never came to the attention of the Secretary (R. 759) as follows:

"* * * There can be little doubt of the co-operation between Federal and State Agents with the co-operatives to bring about a favorable vote for the order in the Referendum. *Of this the Secretary himself was probably unaware and relied on his subordinates.* Indicative of co-operation is the misleading statement in the Department's published statement of August, 1938, taken verbatim from the Dairymen's League News of August 16, 1938.

"After the order became effective on September 1, 1938, strenuous efforts were apparently made to persuade or coerce proprietary handlers to sign the marketing agreement, every handler signing the agreement estopped himself from any legal attack on the order after signing and for a period of 31 to 59 days after he should withdraw from the marketing agreement.

"Specific instances of diversion of withholding of milk from dealers until they signed the marketing agreement appear in the record and some of them were the result of official pressure, *but not directly by the market administrator.*'' (Emphasis supplied.)

All of these things bear out the defense that the Bargaining Agency and Dairymen's League have carried out a scheme to use the Act as a means of granting an unlawful private monopoly; that the Order is unauthorized by the statute; that it is discriminatory, contrary to the language and intent of the Act, is illegal and unenforceable.

SUPPLEMENTAL POINT V.

Judge Cooper's decision is amply supported by the law and the facts, and the judgment granted thereon should be affirmed.

In deciding this case, Judge Cooper followed no new and unheard of theory of law.

This case was in equity. The Act by Section 608a (6) had legislated a method of collecting debt which has been disapproved since the granting of Magna Carta. By the granting of a mandatory injunction, the debtor could be imprisoned for contempt of Court if he did not pay. Actually, he would be imprisoned for non-payment of a civil debt.

The appellees did not raise any legal objection to this method of procedure. They chose to rely on the merits of their case.

The appellees are subject to other penalties of not less than $50.00 or more than $500.00 for each violation of the Order (Section 608c [14]). In any event, an adverse decision of this case would put them all out of business. If not immediately, within a short time.

Proceeding on the theory that a mandatory injunction is properly authorized by the Act, the granting of such an injunction, rests in the sound judicial discretion of the Court:

Moore v. Texas & New Orleans R. R. Co., 297 U. S. 101 (105).

The case of *McNulty v. Mediation Board*, 18 Fed. Supp. 494, tried before Judge Cooper, and decided December 28th, 1936, presented some of the questions raised in the case at bar.

The action was brought by a railroad employee on behalf of himself and 193 other employees to enjoin the D. & H. Railroad Corp. from treating with the Order of Railway Telegraphers.

The action also sought to compel the National Mediation Board to hold a new election among employees to determine who should represent them in collective bargaining. The case involved an election of a bargaining agency or union, comparable to the producer referendum in the case at bar. Judge Cooper pointed out pages 497-502, that the election held, did not present the real issue to the employees voting; that they had no real opportunity to properly express their actual wishes. Judge Cooper said in his opinion:

> "How they would have voted had the real issue before them been presented by the ballot, no one knows or can know until another ballot presenting that issue is taken.
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> "(2) Shall the court by mandatory injunction compel these men to have collective bargaining when they may not want it and compel the road to treat with the O. R. T. as representative in collective bargaining in such circumstances as here exist. Clearly not, unless the court has no other alternative. The defendant O. R. T. says there is no alternative. That defendant contends, if the court understands the argument, that, since the record of the proceedings before the Board are not in the record here, the court cannot go behind the certification of the Board and may only issue mandatory injunction for carrying the certification into effect.
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"The statute provides (Section 2, subd. 4, 45 U. S. C. A. Sec. 152, subd. 4) that the railway shall treat with the representatives certified by the Board and provides elsewhere (Section 2, subd. 10, 45 U. S. C. A. Sec. 152, subd. 10) for penalties for noncompliance.

"*But no authorities have been cited by the defendant O. R. T. and none have been found by the court holding that the court's conscience must be stifled and its discretion must be destroyed.*

"On the contrary, the authorities hold that the court's order must be made in the exercise of sound discretion. *Texas & Pacific Railway Co. v. I. C. C.*, 162 U. S. 197, 16 S. Ct. 666, 683, 40 L. Ed. 940; *Duncan Townsite Company v. Lane*, 245 U. S. 308, 38 S. Ct. 99, 101, 62 L. Ed. 309; *Morrison v. Work*, 266 U. S. 481, 45 S. Ct. 149, 69 L. Ed. 394; *Moor v. Texas & N. O. Ry. Co.*, 297 U. S. 101, 104, 56 S. Ct. 372, 373, 80 L. Ed. 509; *East Tenn., Va. & Ga. Ry. Co. v. I. C. C.*, 181 U. S. 1, 21 S. Ct. 516, 45 L. Ed. 719.

"When the order of such a body (I. C. C.) is sought to be enforced, the Supreme Court said in the *Texas & Pacific* case, *supra*: '*The court ought not to accept the findings of the commission as a legal basis for its own action, but should either inquire into the facts on its own account, or send the case back to the commission to be lawfully proceeded in.*'

"In the *Duncan* case, *supra*, the Court said: 'Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion.'

"(3) A mandatory injunction is like a mandamus in all essential respects, though the latter is directed to a public officer to compel him to perform an administrative act as to which he has no discretion.

"In *Morrison v. Work*, 266 U. S. 481, at page 490, 45 S. Ct. 149, 153, 69 L. Ed. 394, the Court said: 'A mandatory injunction, like a mandamus, is an extraordinary remedial process, which is granted, not as a matter of right, but in the exercise of a sound judicial discretion.'" (Emphasis supplied.)

In the case at bar, Judge Cooper has followed his reasoning in the *McNutt* case. His decision is consistent with the principles of equity which are well settled. The Dairymen's League, which actually intervened at its own instance, sought to be a party plaintiff in order to enforce the Order against appellees (par. 5, League complaint, R. 114).

It sought the same general injunctive relief as the Government did in its complaint (R. 119, 120). The Court properly received evidence of its activities.

We respectfully urge that the Court's sound discretion as exercised is amply justified by the law and the facts. The judgment should be affirmed.

Respectfully submitted,

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